

INTERGOVERNMENTAL AGREEMENT

BETWEEN

THE STATE OF ARIZONA  
AND  
THE CITY OF FLAGSTAFF

AGREEMENT NO. KR 87-2573

*IGA: 87-37*

THIS AGREEMENT, entered into pursuant to Arizona Revised Statutes, Sections 11-951 through 11-954, as amended, by and between the STATE OF ARIZONA, acting by and through the ARIZONA DEPARTMENT OF TRANSPORTATION, hereinafter called "STATE", and the CITY OF FLAGSTAFF, hereinafter called "CITY".

WHEREAS, the STATE is empowered by A.R.S. Section 28-108 to enter into this agreement and the Director of the ARIZONA DEPARTMENT OF TRANSPORTATION has delegated to the undersigned his authorization to execute this Agreement on behalf of the STATE;

WHEREAS, the CITY is empowered by A.R.S. Section 48-572 and by Article I Section 3 of the Charter of the City of Flagstaff to enter into this Agreement, and acting by and through its duly elected City Council, has by that certain resolution attached hereto and incorporated herein, resolved to enter into this Agreement and has authorized the undersigned as its representative to execute the same on behalf of said CITY;

WHEREAS, it is to the mutual benefit of the STATE OF ARIZONA and the CITY OF FLAGSTAFF to enter an agreement covering the maintenance of the existing grader ditch as identified in "Exhibit A", the proposed drainage ditch and pedestrian crossing in same location as identified in "Exhibit B", and the existing and proposed cross-sections of each as identified in "Exhibit C", attached hereto and incorporated herein, within the State I-40 right-of-way.

WHEREAS, the CITY OF FLAGSTAFF shall, except as otherwise expressly provided in this agreement, have jurisdiction and control over routine maintenance and be responsible for routine maintenance of:

- a. Drainage Ditch (ADOT Sta. 2122+02 to Sta. 2130+20).

WHEREAS, the CITY OF FLAGSTAFF shall furnish adequate evidence of full liability and property damage insurance for damage due to flooding of properties adjacent to the aforementioned drainage ditch along the northern subdivision boundary of University Heights which borders Lots 791 through 795.

NO. <u>12579</u>
FILED WITH SECRETARY OF STATE
Date Filed <u>11-16-87</u>
<i>Rose J. Hoffland</i> Secretary of State

WHEREAS, the CITY OF FLAGSTAFF shall furnish adequate evidence of full liability and property damage insurance on all employees engaged in performing duties heretofore agreed to on the State Highway right-of-way. The CITY OF FLAGSTAFF will maintain the insurance for the period of this Agreement. A copy of the policy is attached hereto and marked "Exhibit D", and by reference made a part hereof.

WHEREAS, the CITY OF FLAGSTAFF will provide traffic control in accordance with the Department's Traffic Control Manual for Highway Construction and Maintenance during all maintenance operations by the CITY on the State Highway right-of-way.

This Agreement shall remain in force and effect until termination by the STATE and the CITY upon thirty (30) days written notice of that intent, except, however, that the parties hereto shall retain any continuing obligations contemplated by this Agreement.

All parties are hereby put on notice that this Agreement is subject to cancellation by the Governor pursuant to Arizona Revised Statutes Section 38-511.

This Agreement shall be filed with the Secretary of State and shall become effective on the 16<sup>th</sup> day of November, 19 87, but in no event prior to its being filed with the Secretary of State.

Attached to this Agreement and incorporated herein by reference is "Exhibit E", which is a copy of the written determination of the appropriate attorney that the CITY OF FLAGSTAFF is authorized under the laws of this State to enter into this Agreement and that it is in proper form.

IN WITNESS WHEREOF, the parties have executed this Agreement the day and year first written above.

STATE OF ARIZONA  
ARIZONA DEPARTMENT OF TRANSPORTATION

By: [Signature]

Title: STATE ENGINEER.

CITY OF FLAGSTAFF

By: [Signature]

Title: Mayor

ATTEST:

[Signature]  
City Clerk

C.O.F. FILE #04-86084

CERTIFICATION

I, LINDA BUTLER, City Clerk of the City of Flagstaff, Arizona, do hereby certify that the attached is a full, true, and correct copy of an extract from the Minutes of the Flagstaff City Council Meeting held August 18, 1987.

IN WITNESS WHEREOF, I have hereunto set my hand and impressed the official Seal of the City of Flagstaff, this 13th day of October, 1987.

  
CITY CLERK

(SEAL)

It was moved by Councilmember Loven and seconded by Councilmember Montfort to accept the recommended action. The motion unanimously carried.

Consideration of Bids - Lease of Auger Scraper:

Recommended Action: Accept the only bid received from Empire Machinery of Flagstaff. The rental rate will be \$16,650.00 per month with a total minimum guaranteed rental payment of \$49,950.00.

Councilmember Montfort moved to accept the recommended action. The motion was seconded by Councilmember Darden, which unanimously carried.

Consideration of Bids - Purchase of AT&T Hardware:

Recommended Action: Authorize the City/Police Department to purchase hardware from AT&T at a total cost of \$14,580.00.

A motion was made by Councilmember Montfort and seconded by Mayor Moody to accept the recommended action. The motion unanimously carried.

CONTACTS, LEASES AND AGREEMENTS:

Consideration of Intergovernmental Agreement Proposed by Jamison-Henderson Construction Company, Inc.:

Recommended Action: Staff recommended proceeding with the agreement.

It was moved by Mayor Moody and seconded by Councilmember Loven to proceed with the agreement. The motion unanimously carried.

Consideration of Resolution No. 1495 - Approving Intergovernmental Agreement Between the City of Flagstaff and the Arizona Department of Transportation Pertaining to the Maintenance and Control of a Drainage Easement Within A DOT Right-of-Way:

Recommended Action: Read Resolution No. 1495 for the first time by title only. Adopt Resolution No. 1495.

Proposed Resolution No. 1495 was presented, approving an Intergovernmental Agreement regarding maintenance of a public drainage facility within an A DOT right-of-way. The proposed Resolution had been properly posted. A motion was made by Councilmember Loven and seconded by Councilmember Montfort to read Resolution No. 1495 by title only. The motion unanimously carried. The City Clerk read Resolution No. 1495 by title only as follows:

RESOLUTION NO. 1495

A RESOLUTION APPROVING AN INTERGOVERNMENTAL AGREEMENT REGARDING MAINTENANCE OF A PUBLIC DRAINAGE FACILITY WITHIN AN ARIZONA DEPARTMENT OF TRANSPORTATION RIGHT-OF-WAY.

It was then moved by Mayor Moody and seconded by Councilmember Montfort for the adoption of Resolution No. 1495. The motion unanimously carried.

Consideration of Agreement - Construction of a Non-Directional Beacon (NDB) Site for the Federal Aviation Administration:

Recommended Action: Approve the Agreement between the City and FAA and authorize the Mayor to execute the necessary documents.

Councilmember Darden moved to accept the recommended action. Councilmember Loven seconded the motion. The motion unanimously carried.

Consideration of Contractual Agreements with Main Street Flagstaff Foundation (MSFF) to Cooperate on Main Street Program:

Recommended Action: Approve the Agreement between the City and MSFF and the commitment of funds for Main Street project by the private sector.

A motion was made by Councilmember Loven and seconded by Councilmember Montfort to accept the recommended action. The motion unanimously carried.

Consideration of AT&T System 75 Maintenance Contract:

Recommended Action: Authorize the City/Police Department to enter into a Maintenance Agreement with AT&T.

It was moved by Councilmember Darden and seconded by Councilmember Loven to accept the recommended action. The motion unanimously carried.

Consideration of Extension of Adjusting Services for Liability Claims:

Recommended Action: Authorize a one year extension of the insurance adjusting contract with Arizona Adjustment Agency, Inc. The fees will remain the same, \$175,000 for general or automobile liability claims, with other types of liability claims such as errors and omissions to be on a time and expense basis. The period of the Contract will be from October 1, 1987 to September 30, 1988.

Councilmember Loven moved to accept the recommended action. Councilmember Darden seconded the motion.

Councilmember Darden noted that the Contract expired June 30, 1987. How has this been taken care of since then?

The City Manager replied that the City was using the previous Contract to cover those services. There was a discussion with the Adjustment Agency in June. The expiration date is actually October.

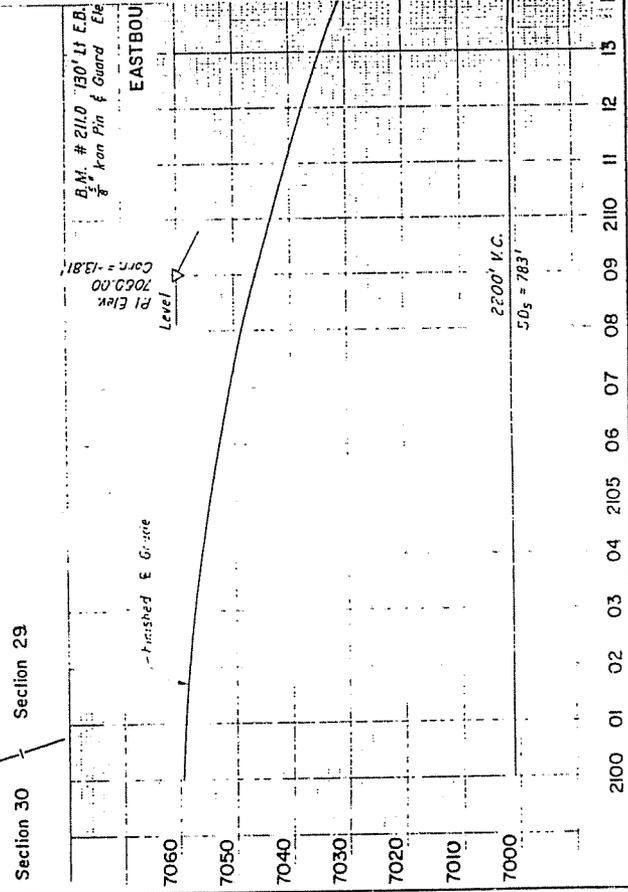
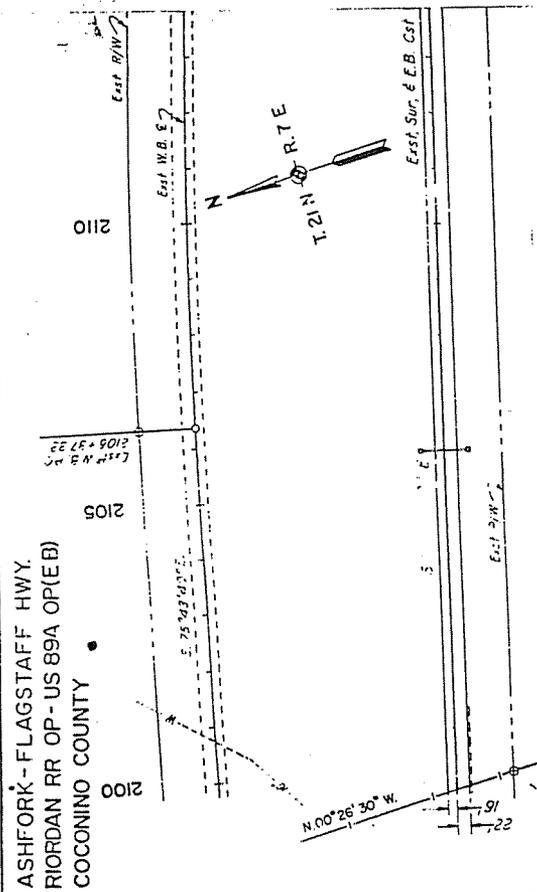
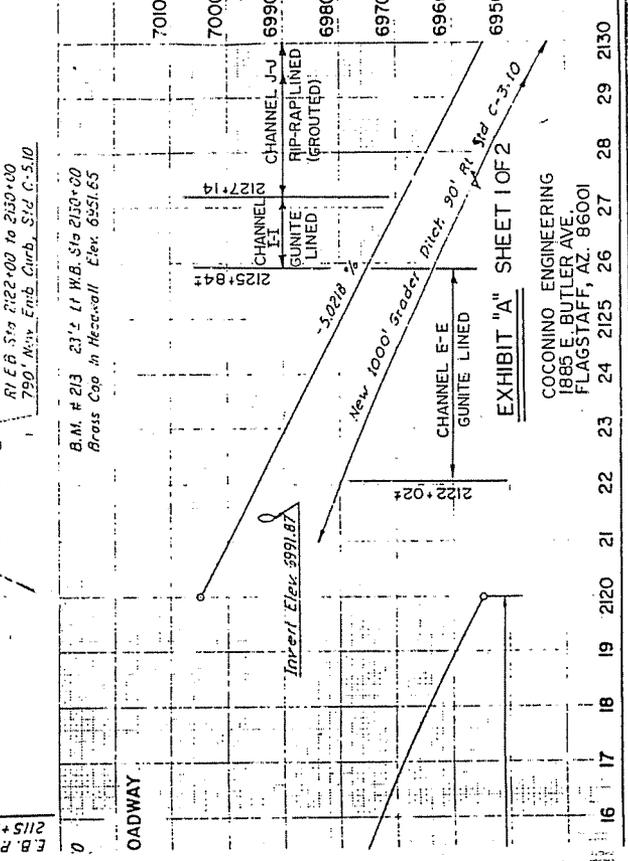
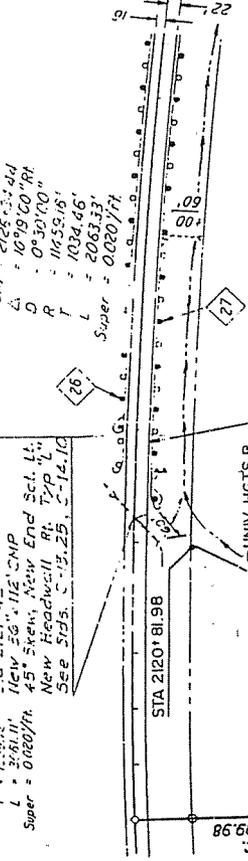
Councilmember Darden referred to a letter from Mr. Robert Larison to Mr. Negroni stated that the Contract will expire on 6/30/87.

Mr. Ernie Negroni, Purchasing Agent, explained that this was bid out sometime in September, and Council awarded the bid in October.

The motion unanimously carried.

DATE	PROJECT NO.	SCALE	SHEET NO.	TOTAL SHEETS
1/27/72	17-40-3822	1/4" = 1'	16	72

ASHFORK-FLAGSTAFF HWY.  
 RIORDAN RR OP - US 89A OP(EB)  
 COCONINO COUNTY



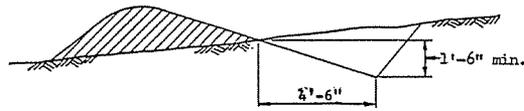
Design Team: Deepak H. Aggarwal - HIGHWAY PLANS SERVICES  
 Drawn By: C. Henry 07/85

COCONINO ENGINEERING  
 1885 E. BUTLER AVE.  
 FLAGSTAFF, AZ. 86001

EXHIBIT "A" SHEET 1 OF 2







EX. GRADER DITCH A.D.O.T. STD. DWG. C-310

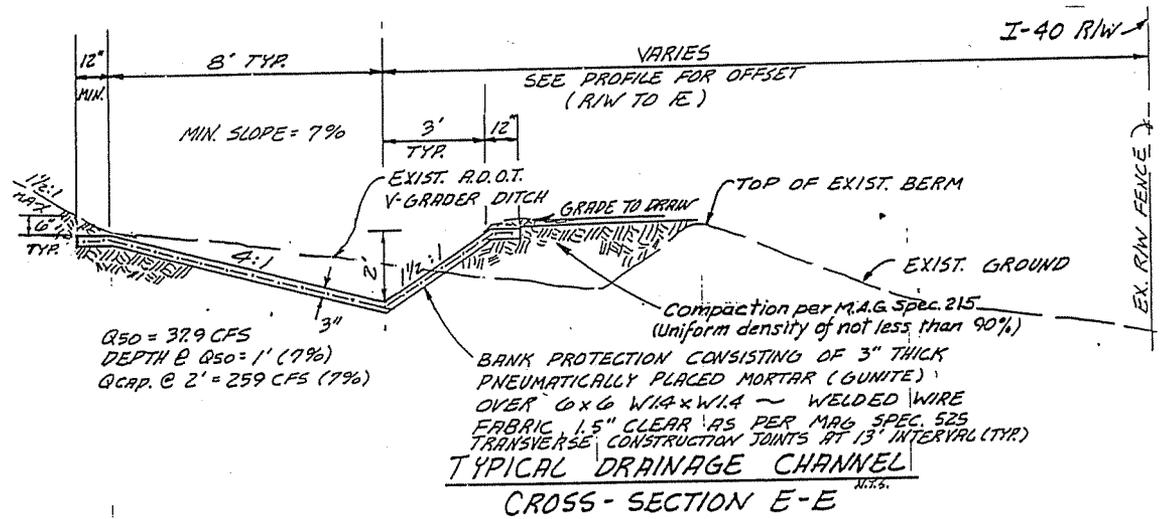
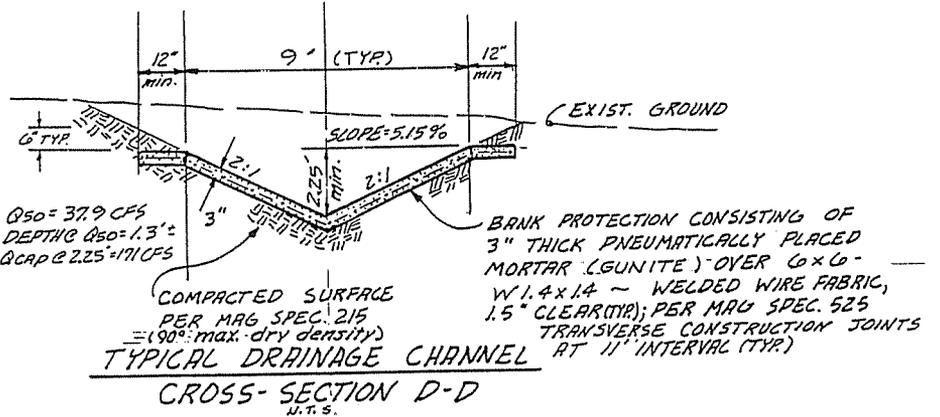


EXHIBIT "C" SHEET 1 OF 2

COCONINO ENGINEERING  
 1885 E. BUTLER AVE.  
 FLAGSTAFF, AZ. 86001



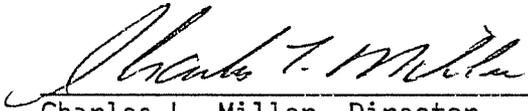
PROJECT:  
SECTION:

UNIVERSITY HIGHLANDS,  
SUBDIVISION

RESOLUTION

BE IT RESOLVED on this 17<sup>th</sup> day of September, 1987, that I, CHARLES L. MILLER, as Director, ARIZONA DEPARTMENT OF TRANSPORTATION, have determined that it is in the best interests of the State of Arizona that the DEPARTMENT OF TRANSPORTATION, acting by and through the Highways Division, enter into an Intergovernmental Agreement with the City of Flagstaff for the purpose of routing the surface water into the Arizona Department of Transportation drainage easement and to outline the jurisdiction and control over maintenance of the drainage ditch.

THEREFORE, authorization is hereby given to draft said agreement which, upon completion, shall be submitted for approval and execution by the State Engineer.

  
\_\_\_\_\_  
Charles L. Miller, Director  
Arizona Department of Transportation

RESOLUTION NO. 1495

A RESOLUTION APPROVING AN INTERGOVERNMENTAL AGREEMENT  
REGARDING MAINTENANCE OF A PUBLIC DRAINAGE FACILITY  
WITHIN AN ARIZONA DEPARTMENT OF TRANSPORTATION RIGHT-OF-WAY

WHEREAS, the development of University Highlands Sub-  
division by Jamison Henderson, Inc. is affecting the drainage  
adjacent to an ADOT drainage easement, and

WHEREAS, it is in the public interest to route the  
surface water into the ADOT drainage easement, and

WHEREAS, it is appropriate to authorize the City to  
exercise control and maintenance over that portion of the  
drainage easement identified in paragraph 5.a. of the Inter-  
governmental Agreement;

NOW, THEREFORE, be it resolved by the Council of the  
City of Flagstaff as follows:

SECTION 1: The Council of the City of Flagstaff,  
pursuant to Article I, §3 of the Flagstaff City Charter does  
hereby approve the Intergovernmental Agreement between the City  
of Flagstaff and the Arizona Department of Transportation.  
Mayor Robert L. Moody is authorized to execute this agreement on  
behalf of the City of Flagstaff.

PASSED AND ADOPTED by the Council and approved by the  
Mayor of the City of Flagstaff this 18th day of August, 1987.

/s/ Robert L. Moody  
Mayor

ATTEST:

/s/ Linda Butler  
City Clerk

APPROVED AS TO FORM:

/s/ Joseph R. Bertoldo  
City Attorney

unihigh.agr/jack/6/22

Attorney General

1275 WEST WASHINGTON

Phoenix, Arizona 85007

Robert K. Corbin

INTERGOVERNMENTAL AGREEMENT

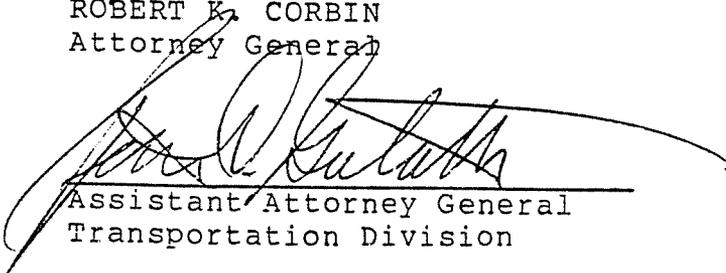
DETERMINATION

A. G. Contract No. KR87-2573, is an agreement between public agencies, has been reviewed pursuant to A.R.S. § 11-952, as amended, by the undersigned Assistant Attorney General who has determined that it is in the proper form and is within the powers and authority granted to the State of Arizona.

No opinion is expressed as to the authority of the remaining parties, other than the State or its agencies, to enter into said agreement.

DATED this 24 day of September, 1987.

ROBERT K. CORBIN  
Attorney General

  
Assistant Attorney General  
Transportation Division

POLICY NUMBER KC 063 44 13	EFFECTIVE DATE 6/1/87	NAMED INSURED FLAGSTAFF, CITY OF ET AL
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**COMPREHENSIVE INSURANCE POLICY  
EXCESS MUNICIPAL LIABILITY**

**SCHEDULE**

**Item 1. Limit of Liability**

Per Occurrence \$ 975,000.

Annual Aggregate \$ 975,000. (Applicable to Products and Completed Operations Hazards and Errors and Omissions)

**Item 2. Named Insured's Retentions**

Per Occurrence \$ 25,000.

Annual Aggregate \$ NOT APPLICABLE

**Item 3. Underlying Coverage**

Company

Policy Number NOT APPLICABLE

Coverage

Limits

**Item 4. Premium** \$ INCL.

Countersigned By \_\_\_\_\_  
Authorized Representative

47

The Insurance Company named in the Declarations hereof, hereafter called "Company" in consideration of the payment of the premium and in reliance upon the statements in the Declarations and application and subject to the limit of liability, exclusions, conditions and other terms of the policy, agrees with the **Named Insured** as follows:

#### I. INSURING AGREEMENT

The Company will pay on behalf of the **Insured** for the **ultimate net loss** in excess of the **retention** which the **Insured** shall become legally obligated to pay by reason of liability imposed by law or liability of others assumed by contract, insofar as the **Named Insured** may legally do so, for damages because of

- Coverage A **Personal Injury**
- Coverage B **Property Damage**
- Coverage C **Errors and Omissions Liability**

and caused by an **occurrence** during the policy period anywhere in the world.

#### II. DEFENSE, SETTLEMENT AND SUPPLEMENTARY PAYMENTS

- A. This policy does not cover **defense costs** accruing before or after entry of judgment within the **Named Insured's retention**. However, the Company shall have the right and opportunity to associate with the **Insured** in the defense, appeal and control of any claim or suit arising out of any **occurrence** and seeking damages in excess of the **retention**. In such event, the **Insured** and the Company shall cooperate fully. If a claim is made or a suit is brought seeking damages in excess of the **retention**, no **defense costs** shall be incurred on behalf of the Company without the written consent of the Company and, notwithstanding such consent, all such costs shall be reasonable.
- B. If a settlement made with the consent of the Company, or a judgment against the **Insured**, exceeds the **retention**, the Company shall pay **defense costs** on that part of the judgment which does not exceed the limit of the Company's liability thereon, in a ratio which its proportion of the liability for the judgment rendered, or settlement, bears to the entire amount of said judgment or settlement.
- C. The Company shall not be responsible for any further sums or to defend any suit after the applicable limit of liability set out in Item 1 of the Schedule has been exhausted in the payment of losses and **defense costs**.

#### III. LIMIT OF LIABILITY

- A. Regardless of the number of: (1) **Insureds** under this policy; (2) person or entities which sustain injury or damage; or (3) claims made or suits brought on account of **personal injury, property damage, and/or errors and omissions**, the Company's maximum liability shall be in accordance with the limit of liability noted in Item 1 of the Schedule.
- B. Except as described in subsection (C) below, the Company shall not pay any claim within the **retention** described in the Schedule.
- C. In the event of reduction or exhaustion of the **Insured's** aggregate retention described in Item 2 of the Schedule or the reduction or exhaustion of the aggregate limit of liability of any underlying insurer described in Item 3 of the Schedule by reason of losses paid thereunder, this policy shall:
  - 1. in the event of reduction, pay the excess of the reduced aggregate retention or reduced underlying limit;
  - 2. in the event of exhaustion, continue in force as underlying limit.
- D. For the purpose of determining the limit of the Company's liability, all damages arising out of continuous or repeated exposure to substantially the same general conditions shall be considered as arising out of one **occurrence**.
- E. Limit of liability shall include **defense costs**.

#### IV. EXCLUSIONS

This policy does not apply:

- A. to any obligation for which the **Insured** or any of its insurers may be held liable under any workers' or unemployment compensation, disability benefits or similar law, including United States Longshoremen's and Harborworkers' benefits;

- B. except with respect to liability for others assumed by the **Insured** under contract, to personal injury to or sickness, disease or death of an employee of the **Insured** arising out of and in the course of his employment by the **Insured**;
- C. to any liability arising out of the ownership, maintenance, operation, use, loading or unloading of any aircraft owned or operated by or rented or loaned to any **Insured**, or any other aircraft operated by any person in the course of his employment by an **Insured**;
- D. to injury to or destruction of: (1) property owned by the **Insured**; or (2) property rented or leased to the **Insured** where the **Insured** had assumed liability for damage to or destruction of such property unless the **Named Insured** would have been liable in the absence of such assumption of liability; or (3) aircraft in the care, custody or control of any **Insured**;
- E. to any liability arising out of the discharge, dispersal, release or escape of smoke, vapors, soot, fumes, acids, alkalis, toxic chemicals, liquids or gases, waste materials or other irritants, contaminants or pollutants into or upon land, the atmosphere or any water course or body of water; this exclusion does not apply if such discharge, dispersal, release or escape is sudden and accidental;
- F. to any liability arising out of or in any way connected with any operation of the principles of eminent domain, condemnation proceedings or **inverse condemnation**, by whatever name called, and whether or not liability accrues directly against any **Insured** by virtue of any agreement entered into by or on behalf of any **Insured**. Notwithstanding the above, the Company shall pay defense costs, as described in Section II, of any suit alleging **inverse condemnation** on the part of any **Insured**, subject to the limit of liability described in Section III;
- G. to any liability: (1) arising in whole, or in part, out of any **Insured** obtaining remuneration or financial gain to which the **Insured** was not legally entitled; or (2) arising out of the willful violation of a penal code or ordinance committed by or with the knowledge or consent of any **Insured**; except that any act pertaining to any one **Insured** shall not be imputed to any other **Insured** for the purpose of determining the application of this exclusion;
- H. to any liability: (1) arising out of estimates of probable costs or cost estimates being exceeded or faulty preparation of bid specifications or plans including architectural plans; or (2) the **Insured's** activities in a fiduciary capacity as respects any employee benefit plan;
- I. to any liability arising out of the ownership, operation, or maintenance of a hospital or airport;
- J. to any liability arising out of change in level of land except that this exclusion shall not apply to **subsidence** caused by a municipal project performed by or under the direct control and supervision of any **Insured**.

V. **DEFINITIONS**

- A. **Automobile** shall mean a land motor vehicle or trailer which shall include the following:
  - 1. Owned Automobile—an **automobile** owned by the **Named Insured**;
  - 2. Hired Automobile—an **automobile** used under contract on behalf of, or loaned to, the **Named Insured** provided such **automobile** is not owned by or registered in the name of: (a) the **Named Insured**; or (b) an officer, **Servant** or employee of the **Named Insured** who is granted an operating allowance of any sort for the use of such automobile.
  - 3. Non-owned **automobile**—any other **automobile**.
- B. **Completed operations hazard** includes liability out of operations or reliance upon a representation or warranty made at any time with respect thereto, but only if the liability occurs after such operations have been completed or abandoned and occurs away from premises owned by or rented to the **Named Insured**. "Operations" include materials, parts or equipment furnished in connection therewith. Operations shall be deemed completed at the earliest of the following times:
  - 1. when all operations to be performed by or on behalf of the **Named Insured** under the contract have been completed;
  - 2. when all operations to be performed by or on behalf of the **Named Insured** at the site of the operations have been completed; or

- 3. when the portion of the work out of which the injury or damage arises has been put to its intended use by any person or entity other than another contractor or subcontractor engaged in performing operations for a principal as a part of the same project.

Operations which may require further service or maintenance work or correction, repair or replacement because of any defect or deficiency, but which are otherwise complete, shall be deemed completed. The **completed operations hazard** does not include liability arising out of:

- 1. operations in connection with the transportation of property, unless the liability arises out of a condition in or on a vehicle created by the loading or unloading thereof;
- 2. the existence of tools, uninstalled equipment or abandoned or unused materials; or
- 3. operations for which the classification stated in the policy or in the Company's manual specifies "including **completed operations.**"

C. **Defense costs** means all fees and expense caused by and relating to the adjustment, investigation, defense or litigation of a claim including attorney's fees, court costs and interest on judgments accruing after entry of judgment. **Defense costs** shall not include the office expenses of the Company or the **Insured** nor the salaries of employees or officials of the Company or any **Insured**.

D. **Errors and omissions** means any actual misstatement or misleading statement or act or omission or neglect or breach of duty including misfeasance, malfeasance and nonfeasance by an **Insured** in their capacity as such.

E. **Insured** means the **Named Insured** and the following:

- 1. past or present employees, servants or elected or appointed officials of the **Named Insured** and such commissions, boards, districts, and authorities which operate under the direct supervision and control of the **Named Insured**, when acting in their capacity as such employees or elected or appointed officials; and
- 2. those individuals and under the circumstances described in subsection E(1) above while such individuals operate any **automobile** owned by, loaned to or leased by the **Named Insured**.

Notwithstanding the above, the term **Insured** shall not include any person or entity loaning or leasing an automobile to an **Insured**, as described in subsection D(2) above. Neither will such term include any person or entity or any officer or employee thereof, engaged in selling, repairing, servicing, delivering, testing, road testing, parking or storing automobiles with respect to any **occurrence** arising out of such activities.

F. **Inverse condemnation** means a claim by any one other than an **Insured** that an **Insured** has taken or diminished the value of land through land use restrictions on such land or use of adjacent land or air space by an **Insured**.

G. **Named Insured** shall mean the entity designated as such on the policy of which this is a part.

H. **Named Insured's products** means goods or products manufactured, sold, handled or distributed by the **Named Insured** or by others trading under its name, including any container thereof, other than a vehicle, but the **Named Insured's products** shall not include a vending machine or any property other than such container, rented to or located for use of others but not sold.

I. **Occurrence** means an accident, event or error or omission during the policy period, including injurious exposure to conditions, which results in **personal injury, property damage, or errors and omissions** neither expected nor intended from the standpoint of the **Insured**.

J. **Personal injury** includes

- 1. Bodily injury, sickness, disease, disability, shock, fright; mental anguish, and mental injury, including death at any time resulting therefrom;
- 2. False arrest, false imprisonment, wrongful entry, wrongful eviction, wrongful detention, malicious prosecution and humiliation;
- 3. The publication or utterance of a libel or slander or of other defamatory or derogatory material, or a publication or utterance in violation of rights of privacy;
- 4. Piracy, unfair competition or idea misappropriation under an Implied contract or infringement of copyright, title or slogan arising out of the **Named Insured's** advertising activities;

5/7

- 5. Racial, religious, sex, or age discrimination unless insurance thereof prohibited by law; and
- 6. Assault and battery not committed by or at the direction of the **Insured** unless committed for the purpose of preventing or eliminating danger to person or property.
- K. **Products hazard** includes **personal injury** and **property damage** arising out of the **Named Insured's** **products** or reliance upon a representation or warranty made at any time with respect thereto, but only if the **personal injury** or **property damage** occurs after physical possession of such products has been relinquished to others.
- L. **Property damage** means (1) physical injury to or destruction of tangible property which occurs during the policy period including the loss of use thereof at any time resulting therefrom; or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an **occurrence** during the policy period.
- M. **Retention** means either the self insured retention of the **Insured** or the underlying insurance described in Item 2 or 3, respectively, of the Schedule. The self insured retention described in Item 2 includes **defense costs**.
- N. **Servant** means an individual, other than an independent contractor, who is authorized by the **Named Insured** to act on behalf of the **Named Insured** but who acts without compensation.
- O. **Subsidence** means the sudden or gradual downward or lateral movement of the surface or subsurface of land resulting in **property damage** or **personal injury**.
- P. **Ultimate net loss** means the sum actually paid or payable in cash in the settlement or satisfaction of losses for which the **Insured** is liable either by adjudication or by compromise with the written consent of the Company, after making proper deduction for all recoveries and salvages and other collectible insurance, and including **defense costs**.

**VI. CONDITIONS**

**A. PREMIUM**

The premium set forth in the Schedule is an estimated premium only, unless indicated as a fixed premium. Upon termination of this policy, where the premium is estimated, earned premium shall be computed in accordance with the premium computation provisions of an endorsement attached hereto. Where the earned premium thus computed exceeds the advance premium paid, the **Insured** shall pay the remaining earned premium to the Company. Where the earned premium thus computed is less than the advance premium paid, the Company shall return the unearned premium to the **Named Insured**.

**B. INSPECTION AND AUDIT**

The Company shall be permitted but not obligated to inspect the **Named Insured's** property and operations at any time. Neither the Company's right to make inspections nor the making thereof nor any report thereon shall constitute an undertaking, on behalf of or for the benefit of the **Named Insured** or others, to determine or warrant that such property or operations are safe or healthful, or are in compliance with any law, rule or regulation. The Company may examine and audit the **Named Insured's** books and records at any time during the policy period and extensions thereof and within three years after the final termination of this policy, as far as they relate to the subject matter of this insurance.

**C. SEVERABILITY OF INTEREST**

The term "the **Insured**" is used severally and not collectively, but the inclusion herein of more than one **Insured** shall not operate to increase the limits of the Company's liability.

**D. PAYMENTS**

If circumstances should occur wherein any **Insured** or any combination of **Insureds** shall be determined to be legally liable to one or more person in a sum in excess of the limit of liability of the Company, or in such manner as to render one or more **Insureds** liable in excess of the limit of liability of the Company, then the Company may, at its option, apportion its payment on behalf of each **Insured** in the same proportion that the liability of each **Insured** bears to total liability of all **Insureds**. Such payments by the Company shall be deemed to constitute full and final payment by the Company of all of its obligations to all **Insureds**, and in no event shall the Company be liable for more than the agreed limit of liability.

6/7

E. ACTION AGAINST COMPANY

No action shall lie against the Company unless, as a condition precedent thereto, there shall have been full compliance with all of the terms of this policy, nor until the amount of the **Insured's** obligation to pay shall have been finally determined either by judgment against the **Insured** after actual trial or by written agreement of the **Insured**, the claimant and the Company. Any person or organization or the local representative thereof who has secured such judgment or written agreement shall thereafter be entitled to recover under this policy to the extent of the insurance afforded by this policy. No person or entity shall have any right under this policy to join the Company as a party to any action against the **Insured** to determine the **Insured's** liability, nor shall the Company be impleaded by the **Insured** or its legal representative. Bankruptcy or insolvency of the **Insured** or of the **Insured's** estate shall not relieve the Company of any of its obligations hereunder.

F. INSURED'S DUTIES IN THE EVENT OF A CLAIM

In the event of a claim which is greater than or equal to, or an occurrence which is reserved at greater than or equal to, seventy-five (75) percent of the **Insured's retention**, the **Insured** shall:

1. give to the Company, or any of its authorized agents, written notice containing particulars sufficient to identify the **Insured** and also reasonably obtainable information with respect to the time, place and circumstances thereof, and the names and addresses of the injured and of available witnesses as soon as practicable;
2. immediately forward to the Company, or any of its authorized agents, every demand, notice, summons or other processes received by the **Insured** or its representative.

The **Insured** shall cooperate with the Company and, upon the Company's request, assist in making settlements, in the conduct or suits and in enforcing any right of contribution or indemnity against any person or entity who may be liable to the **Insured** because of injury or damage with respect to which insurance is afforded under this policy; the **Insured** shall attend hearings and trials and assist in securing and giving evidence and obtaining the attendance of witnesses. The **Insured** shall not, except at its own cost, voluntarily make any payment, assume any obligation or incur any expense in excess of its **retention**. However, in the event that an **ultimate net loss** in excess of the **retention** becomes certain either through trial court judgment or agreement among the **Insured**, the claimant and the Company, then the **Insured** for that part of such payment which is in excess of the **retention**, or the Company, will, upon request of the **Insured**, make such payment to the claimant on behalf of the **Insured**.

G. CHANGES

Notice to any agent or knowledge possessed by any agent or by any other person shall not effect a waiver or a change in any part of this policy or estop the Company from asserting any right under the terms of this policy; nor shall the terms of this policy be waived or changed, except by endorsement issued to form a part of this policy.

H. ASSIGNMENT

Assignment of interest under this policy shall not bind the Company until its consent is endorsed hereon. If, however, an **Insured** shall die, such insurance as is afforded by this policy shall apply: (1) to the **Insured's** legal representative, as the **Insured**, but only while acting within the scope of his duties as such; and (2) with respect to the property of the **Insured**, to the person having proper temporary custody thereof, as the **Insured** but only until the appointment and qualification of the legal representative.

I. THREE YEAR POLICY

If this policy is issued for a period of three years, any limit of the Company's liability stated in Item 1 of the Schedule as "annual aggregate" shall apply separately to each consecutive annual period of the policy.

J. OTHER INSURANCE

If valid and collectible insurance with any insurer is available to the **Insured** covering a loss also covered hereunder, the insurance hereunder shall be in excess of, and not contribute with, such other insurance provided, however, this does not apply to insurance which is written as excess insurance over the Company's limit of liability provided in this policy. When both this insurance and other insurance apply

17  
to the loss on the same basis whether primary, excess or contingent, the Company shall not be liable under this policy for a greater proportion of the loss than that stated in the applicable contribution provision below:

1. **Contribution by equal shares.** If all of such other valid and collectible insurance provides for contribution by equal shares, the Company shall not be liable for a greater proportion of such loss than would be payable if each insurer contributes an equal share until the share of each insurer equals the lowest applicable limit of liability under any one policy or the full amount of the loss is paid, and with respect to any amount of loss not so paid, the remaining insurers then continue to contribute equal shares of the remaining amount of the loss until each such insurer has paid its limit in full or the full amount of the loss is paid.
2. **Contribution by limits.** If any of such other insurance does not provide for contribution by equal shares, the Company shall not be liable for greater proportion of such loss than the applicable limit of liability under this policy for such loss bears to the total applicable limit of liability of all valid and collectible insurance against such loss.

#### K. SUBROGATION

The Company shall be subrogated to the extent of any payment hereunder to all the **Insured's** rights of recovery thereof, and the **Insured** shall do nothing after loss to prejudice such right and shall do everything necessary to secure such right. Any amount so recovered shall be apportioned as follows:

1. Any interest (including the **Insured's**) having paid an amount in excess of the **Named Insured's retention** plus the limit of liability hereunder shall be reimbursed first to the extent of the actual payment. The Company shall be reimbursed next to the extent of its actual payment hereunder. If any balance then remains unpaid, it shall be applied to reimburse the **Insured** or any underlying insurer, as their interests may appear.
2. The expenses of all such recovery proceedings shall be apportioned in the ratio of respective recoveries. If there is no recovery in proceedings conducted by the Company, it shall bear the expenses thereof.

#### L. CANCELLATION

This policy may be cancelled by the **Named Insured** by surrender thereof to the Company or any of its authorized agents or by mailing to the Company written notice stating when thereafter the cancellation shall be effective. This policy may be cancelled by the Company by mailing to the **Named Insured** at its last known address, written notice stating when not less than sixty days thereafter such cancellation shall be effective, provided that, if the **Insured** fails to discharge when due any of its obligations in connection with the payment of premium for this policy or any installment thereof, this policy may be cancelled by the Company by mailing to the **Named Insured** at its last known address, written notice stating when not less than ten days thereafter such cancellation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice. The time of surrender or the effective date and hour of cancellation stated in the notice shall become the end of the policy period. If the Company cancels, earned premium shall be computed pro rata. If the **Named Insured** cancels, return premium shall be computed as 90% of pro rata. Premium adjustment may be made either at the time cancellation is effected or as soon as practicable after cancellation becomes effective, but payment or tender of unearned premium is not a condition of cancellation.

#### M. ACCEPTANCE

By acceptance of this policy the **Insured** represents that the information contained in the Schedule and any application submitted to obtain this insurance is accurate and provided in good faith and that this policy is issued in reliance on such representation. It is understood and agreed that this policy embodies all agreements between the Company and the **Insured** relating to this insurance.

#### N. APPEALS

In the event the **Insured** or any insurer with valid and collectible insurance applying to an **occurrence** elects not to appeal a judgment in excess of the **retention**, the Company may elect to do so at its own expense, and shall be liable for the taxable costs, disbursements and interest incidental thereto, but in no event shall the liability of the Company for **ultimate net loss** exceed the amount specified in Item 1 of the Schedule plus the **defense costs**.